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June 23, 1994

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JUN 23 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 93-107  
Channel 280A  
Westerville, Ohio

Dear Mr. Caton:

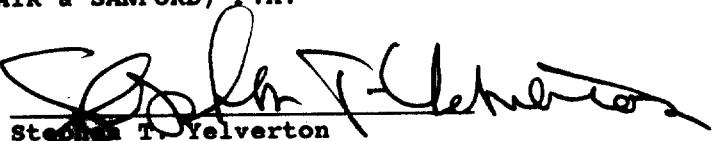
Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Reply to Opposition of Davis."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:

  
Stephen T. Felverton

Enclosure

B:CATON.146

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DOCKET FILE COPY ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction  
Permit for a New FM Station,  
Channel 280A, Westerville,  
Ohio

To: The Review Board

)  
)  
) MM Docket No. 93-107

)  
) File Nos. BPH-911230MA

)  
) through

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) BPH-911231MB  
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JUN 23 1994

REPLY TO OPPOSITION OF DAVIS

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: \_\_\_\_\_

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June 23, 1994

B:CATON.146

REPLY TO OPPOSITION OF DAVIS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (c)(3) of the Commission's Rules, hereby submits this reply to opposition. On June 6, 1994, ORA filed a motion to dismiss the application of Shellee F. Davis ("Davis"). Dismissal was requested because Davis does not have a proposed tower site and because she has failed to diligently prosecute her application by not obtaining a new site. On June 15, 1994, Davis filed an opposition thereto. In reply to the opposition, ORA submits the following comments.

As noted in the motion to dismiss, Davis filed an amendment on March 28, 1994, and reported that her proposed tower site had been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Although Davis never disclosed when the site was sold, she was given written confirmation of the sale by Mid-Ohio on March 2, 1994.

Davis further claimed that she had received "reasonable assurance" of the availability of the tower site from the new owner. However, in a pleading, dated May 3, 1994, Davis reported that the new owner had changed his mind. Davis was aware of the unavailability of the tower site from the new owner at least by April 13, 1994. Davis represented in her May 3, 1994, pleading that she was in the process of securing permission for a new site and promised to file an amendment. Davis so far has failed to file an amendment specifying a new tower site. David A. Ringer, another applicant in this proceeding who also had initially specified the now unavailable Mid-Ohio tower site, filed amendment on May 9, 1994, specifying a new tower site.

ORA contended in its motion to dismiss that the application of Davis must be dismissed with prejudice for failure to prosecute. She does not have a tower site and has not been diligent in specifying a new site.

In opposition to the motion to dismiss, Davis contends Commission precedent does not require dismissal of her application because of a failure to amend to specify a new tower site. However, Davis is wrong as to this fundamental tenet of Commission policy. Royce International Broadcasting Co. v. FCC, 820 F.2d 1332, 1332 (D.C. Cir. 1987).

Davis further claims that she will amend her application within three weeks to specify a new tower site. According to Davis, Commission policy gives her at least six months to locate a new tower site and to file an appropriate amendment.

However, Davis misunderstands Commission policy in this respect. Due diligence depends on the unique facts and circumstances of each case. Shablom Broadcasting, Inc., 93 FCC2d 1027, 1030 (Rev. Bd. 1983). See also, CHM Broadcasting Limited Partnership v. FCC, Case No. 92-1263, p. 12, decided June 13, 1994, due diligence is an essential element of "good cause" to amend and such due diligence is measured from the date an applicant is put on notice or challenged as to an application deficiency. There, the Court held that an applicant was required to amend its application, at least, by the time it responded to a motion to enlarge the issues raising an application deficiency.

In this case, due diligence must be measured against Ringer's filing of a tower site amendment on May 9, 1994, and ORA's June 6, 1994, motion to dismiss challenging Davis' lack of due diligence in this respect. Davis and Ringer are identically situated. Therefore, Davis must explain and justify why she could not also have filed an amendment specifying a new tower site by May 9, 1994, or at the very least, by the time of her filing a response on June 15, 1994, to ORA's motion to dismiss.

Davis' promise, in her June 15, 1994, opposition, to file a tower site amendment within three weeks, must be evaluated in the context of her earlier promise to file a tower site amendment. In her May 3, 1994, pleading, Davis made such a vague promise, but never fulfilled it. Simply put, Davis can not be relied upon to make good on her promises.

WHEREFORE, in view of the foregoing, Davis must be dismissed with prejudice forthwith because she does not have a proposed tower site and because she has failed to diligently prosecute her application by not obtaining a new site.

Respectfully submitted,

McNAIR & SANFORD, P.A.

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June 23, 1994

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 23rd day of June, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of Davis" to the following:

Joseph A. Marino, Chairman\*  
Review Board  
Federal Communications Commission  
Room 211  
2000 L Street, N.W.  
Washington, D.C. 20554

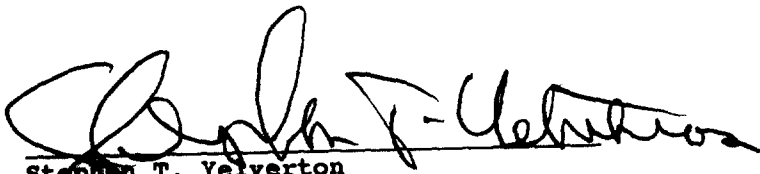
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\*Hand Delivery